

MIKE McGRATH
Montana Attorney General
CANDACE F. WEST, Mt. Bar. No. 2639
Assistant Attorney General
Pro Hac Vice
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549

COUNSEL FOR AMICUS
State of Montana

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

PEOPLE OF THE STATE OF
CALIFORNIA ex rel. BILL LOCKYER,
ATTORNEY GENERAL; STATE OF
NEW MEXICO ex rel. PATRICIA A.
MADRID, ATTORNEY GENERAL;
STATE OF OREGON by and through
THEODORE KULONGOSKI,
GOVERNOR, STATE OF
WASHINGTON, by and through
CHRISTINE GREGOIRE,
GOVERNOR,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE; MIKE JOHANNIS,
Secretary of the Department of
Agriculture; MARK REY, Under
Secretary for Natural Resources and
Environment of the Department of
Agriculture; UNITED STATES
FOREST SERVICE; DALE
BOSWORTH, Chief of the United States
Forest Service,

Defendants.

Cause No. 05-03508 EDL

**AMICUS CURIAE STATES
MEMORANDUM IN SUPPORT
OF STATE PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

Amicus State of Montana, through its Attorney General along with amicus State of Maine, through its Attorney General, support the State Plaintiffs' Motion for Summary Judgment in their action to set aside the United States Forest Service's repeal of the 2001 Rule Protecting Inventoried Roadless Areas ("Roadless Rule").¹ Roadless areas in Montana make up about 6.4 million acres or 6.8% of Montana's land base. Roadless areas in Maine include 17,100 acres. The states share a common interest in protecting the roadless areas nationwide because they are of collective and universal value, not merely provincial value. Protected roadless areas serve as a primary source of clean water for fish and for wildlife, as well as for sources for the water supplies for our states' cities and towns. Protection of roadless areas provides habitat for threatened and endangered species as well as for big game species.

In Montana alone, our unparalleled five-week long big game general hunting season depends extensively upon the habitat security provided by roadless areas within our state's forested lands. Roadless areas are a source of thousands of fishing days and wilderness hiking and camping experiences in Montana for our residents and tourists alike. The protection of the unique and treasured characteristics of the roadless areas in Montana and other states is critical for the quality of the environs of the state and the value those areas provide to the citizens here and throughout the nation. Amici's interest in the Roadless Rule is founded in the protection it affords our resources and the enhancement of those resources into the future. Our abiding interest in protecting resources that provide clean water for our citizens and habitat for our fish and wildlife is well established in the amici states.

¹ 36 C.F.R. §§ 294.12-13 (2001).

1 Montana's paramount concern is in protecting its inventoried roadless areas
2 in their entirety and long into the future. Of necessity, Montana is currently
3 working within the administration's repeal rule and new administrative process
4 adopted May 13, 2005 (70 Fed. Reg. 25654) to develop Montana's statewide
5 Petition for Inventoried Roadless Area Management. Montana is nonetheless
6 concerned that the repeal of the Roadless Rule ("Roadless Repeal") leaves a
7 vacuum in forest management and protection in Montana until its petition is acted
8 upon. Montana is also concerned with potentially inconsistent treatment among
9 adjoining western states with inventoried roadless areas.

10 More generally, the amici states believe that the Roadless Repeal simply
11 lacks the level of environmental analysis required under the National Environmental
12 Protection Act (NEPA), including the degree of public participation necessary for
13 an action having such significant and national consequences. The Roadless Rule,
14 adopted in 2001 following a comprehensive NEPA review process and unmatched
15 for its citizen participation and support, is representative of the appropriate
16 management and protection of public resources. It should not be repealed without
17 comprehensive NEPA analysis. Therefore, while preparing to petition for
18 protection through state-specific management as provided for by the Repeal rule,
19 the amicus states nonetheless urge protection of the roadless area resources
20 nationwide and support State Plaintiffs' challenge to the Roadless Repeal.

21 22 **INTEREST OF AMICUS CURIAE STATES**

23 The State of Montana has 6,397,000 inventoried roadless acres of federal
24 lands. The Montana Attorney General, Mike McGrath, is the State's chief legal
25 officer and also one of five members of the State Land Board, which governs the
26 use of 5.2 million acres of state-owned land. Mont. Const. art. X, § 4; Mont. Code
27 Ann. § 2-15-501 (2005). In his official capacity, the Attorney General has a

1 significant interest in the management of roadless lands within Montana and the
2 prevention of the repeal of the protection of those lands. Montana has the third
3 largest total area that had been protected by the Roadless Rule--all of which is
4 placed at risk in the Roadless repeal. Under Montana law, the Attorney General has
5 the common law authority to appear in all actions affecting the public interest.
6 State ex rel. Olsen v. Public Serv. Comm'n, 129 Mont. 101, 283 P.2d 602, 603
7 (1955). It is in the interest of the public to protect the remaining remnants of
8 contiguous roadless lands in Montana now and into the future.

9 Maine's White Mountain National Forest encompasses 17,100 acres of
10 inventoried roadless area. This pristine national forest shelters the watersheds of
11 the Saco River, the Presumpscot River, Casco Bay, and the Androscoggin River,
12 waters that are vital to Maine's drinking water supply, water-based recreation and
13 economy. It also provides critical habitat for the bald eagle, lynx, gray wolf and
14 Indiana bat. Recreation in Maine's national forest contributes to a growing
15 economic force that Maine cannot afford to lose; wildlife related activities
16 contributed \$916 million to Maine's economy in 2001. However, the Roadless
17 Repeal has opened approximately 60% of these 17,100 acres to road building and
18 logging--including more than 8,000 acres around the Caribou Speckled-Mountain
19 Wilderness, which are intended for future timber harvest, even as the U.S. Forest
20 Service states these areas provide "important enhancements of the Wilderness
21 characteristics, including isolation and solitude."² Maine supports the State
22 Plaintiffs' Motion for Summary Judgment for the protection of these important
23 natural resources.

24
25 ² Appendix C--Final Environmental Impact Statement, White Mountain
26 National Forest Proposed Land and Resource Management Plan, 2005, pages C-14
27 and C-15.

BACKGROUND

The public process leading up to the adoption of the Roadless Rule³ on January 12, 2001 (66 Fed. Reg. 3244) was actually begun over thirty years ago with the comprehensive inventory of roadless area units.⁴ Since the time of the completion of that inventory, approximately 2.8 million acres in Inventoried Roadless Areas have already been developed. Accordingly, the Department of Agriculture's interest in undertaking extensive environmental studies and in consideration of applicable rules for the protection of the amenities of the remaining roadless lands was compelling.

Throughout its review process, the U.S. Forest Service went well beyond its statutory duty to involve the public. In Montana, for example, the Forest Service held 34 public meetings, not only in large cities such as Billings and Kalispell, but also in very small communities such as Plains and Divide, which are closest to roadless areas impacted by the Rule.⁵ The public turnout was impressive. In all, 17,429 Montanans participated in the NEPA process, and of those commenting, 11,654 favored even stronger roadless area protections than those proposed in the Forest Service's draft environmental impact statement ("Draft EIS"). In Maine, citizens submitted 15,434 comments to the Forest Service, 95% of which called for the strongest protections of Maine's roadless forests.

Ultimately, the Forest Service promulgated a final rule that responded to overwhelming public support--both nationally and in the amicus states--for a

³ 36 C.F.R. §§ 294.12-13.

⁴ Forest areas greater than 5,000 acres within the National Forest System.

⁵ For dates and locations of all public meetings in Montana, see Roadless Area Conservation, <http://www.roadless.fs.fed.us/states/mt/meeting3.shtml> (scoping meetings); <http://www.roadless.fs.fed.us/states/mt/meeting4.shtml> (Draft EIS meetings).

1 national prohibition on road building on inventoried roadless areas on National
2 Forest lands.

3 4 **DISCUSSION**

5 In their Motion for Summary Judgment, the Plaintiff States argue that the
6 environmental analysis and public-comment process for repealing the Roadless
7 Rule is flawed. As such, a review of the process followed by the Department of
8 Agriculture in promulgating the Roadless Rule in 2001 may be instructive for this
9 court when determining whether the 2005 final decision repealing the rule had
10 sufficient public process or environmental analysis.

11 The NEPA scoping process is governed by 40 C.F.R. § 1501.7, which
12 generally requires federal agencies to invite public participation in “an early and
13 open process for determining the scope of issues to be addressed and for identifying
14 the significant issues related to the proposed action.” *Id.* At the time of the
15 adoption of the Roadless Rule in 2001, 1.2 million Americans, many citizens of the
16 amicus states among them, were able to participate in its development. Both at the
17 scoping stage and after the Draft EIS was issued, the Forest Service actively sought
18 and responded to that public input. The opportunity for comment from the public at
19 the scoping stage was, therefore, extensive and sufficient as measured under NEPA
20 standards.

21 In the development of the Roadless Rule, the Forest Service published a
22 Notice of Intent to Prepare a Draft EIS, 64 Fed. Reg. 56,306 (Oct. 19, 1999),
23 addressing long-term protection for Forest Service roadless areas. Over the next
24 two months, the Forest Service held 187 public scoping meetings, attended by
25 16,000 people, and received more than 517,000 comments on the idea. In Montana
26 alone, the Forest Service held ten public scoping meetings, one for each National
27 Forest in Montana. Those scoping meetings were held across the state in Missoula,

1 Great Falls, Libby, Hamilton, Kalispell, Billings, Helena, Bozeman, and Dillon.
2 Although the Council for Environmental Quality regulations (CEQ) does not
3 require the Forest Service to hold any meetings, this statewide effort to involve
4 local citizens in the earliest stages of the scoping process under NEPA was more
5 than sufficient under 40 C.F.R. § 1506.6.⁶

6 Following the issuing of the Forest Service’s Draft EIS, the Forest Service
7 held over 400 public meetings nationwide, including 34 meetings across Montana.
8 This public participation process was nothing short of exemplary. From the largest
9 cities to the smallest rural communities, citizens in the amicus states had an
10 opportunity to make their opinions on the proposed roadless protection policy
11 heard. Well over 17,000 Montanans and 15,000 Mainers provided comments. Of
12 those commenting, ultimately, 67% of commenters in Montana and 95% of the
13 commenters in Maine favored even stronger protections for roadless areas than
14 those proposed in the Draft EIS.⁷ Nationally, 96% of commenters favored even
15 stronger protections than those proposed in the Draft EIS for the Roadless Area
16 Conservation Rule.

17 The final Roadless Rule thus responded to a clear majority of public
18 comments, both nationally and in the amicus states, by further strengthening
19 roadless area protections. In comparison, the Roadless Repeal is unsupported by
20 any record reflecting substantive agency analysis of the effect of the repeal on the
21

22 ⁶ See, <http://www.roadless.fs.fed.us/states/mt/meeting3.shtml>.

23 ⁷ Draft EIS meetings were held in Wisdom, Butte, Divide, Dillon, Deer Lodge,
24 Philipsburg, Boulder, Whitehall, Sheridan, Ennis, Hamilton, Billings, Kalispell,
25 Bozeman, Helena, Libby, Great Falls, White Sulphur Springs, Missoula, and Plains.
26 See Roadless Area Conservation, <http://www.roadless.fs.fed.us/states/mt/meeting4.shtml>; See, Horstmeyer, Seth.
27 “State by State roadless comments TOTAL for all comment periods.” Heritage
Forests Campaign, October 24, 2005.

1 protections afforded to identified and inventoried roadless area values. The record
2 relative to the repeal consists of nothing more than talking points, public notices and
3 press releases. The Forest Service’s claim that the 2001 EIS analysis and public
4 comment is sufficient for supporting a determination to repeal the Roadless Rule is
5 inconsistent and in conflict with the huge support given to the enactment of the
6 roadless protection in the 2001 rule. In other words, both the analysis of the
7 effectiveness of the protection and the public support for the Roadless Rule are
8 directly opposed to the adoption of the Roadless Repeal.

9 In contrast to the thorough environmental analysis and public process
10 undertaken in the Roadless Rule--which was intended to protect roadless areas
11 from development—the current repeal creates the potential for specific roadless
12 area development, and leaves the analysis of environmental effects, literally,
13 yet-to-be-determined. The Department of Agriculture stated in its Notice of
14 Proposed rulemaking, under 36 C.F.R § 294 (July 16, 2004) that the proposed rule
15 had been reviewed under USDA procedures and regulatory planning and review,
16 and that “it has been determined that this is not an economically significant rule.”⁸
17 However, such a contention is at its heart absurd when one looks at what the
18 wildlife-related industries and recreational opportunities contribute to amicus states’
19 economies every year.⁹ A NEPA analysis under the roadless repeal based solely
20 on the no-action alternative proposed under the Roadless Rule Notice is
21 qualitatively flawed. In fact, the agency had previously rejected the “no action”

22
23 ⁸ The forest service contends that the proposed rule would not have an annual
24 effect of \$100 million or more on the economy nor adversely affect productivity,
25 competition, jobs, the environment, public health or safety, nor State or local
governments. 69 Fed. Reg. 42636 at 42638.

26 ⁹ The annual economic benefits from wildlife-related industries total \$1.7
27 billion dollars in the State of Montana and \$916 million dollars in the State of
Maine.

1 alternative¹⁰ on the grounds that it would lead to construction of 232 miles of new
2 or reconstructed road per year in roadless areas, and would thereby lead to further
3 roadless area fragmentation and loss of roadless characteristics. The no-action
4 alternative was not selected then because it did not meet the specified purpose and
5 need for the proposed action, and it could not be selected as an alternative now in
6 this wholly opposite proposed action. Furthermore, the no-action alternation to the
7 Draft EIS was rejected by 98% of commenters to the EIS in the Roadless Rule.

8 The Roadless Repeal involved no agency environmental analysis to which
9 the public could respond nor any public meetings at which the public could address
10 their concerns to the decision makers. In fact, the Forest Service did nothing by
11 way of any administrative process to ensure that public concerns were given either
12 consideration or a reasoned response. Quite simply, the states are left to exercise
13 management recommendations without the benefit of substantive environmental
14 review or meaningful public input except as each state might devise. Therefore, the
15 agency's decision to repeal the well-supported Roadless Rule should be set aside as
16 the State Plaintiffs urge.

17 For the foregoing reasons, the amicus states respectfully support the State
18 Plaintiffs' Motion for Summary Judgment. The Motion should be granted in order
19 to provide for the long-term protection of the remaining inventoried roadless lands.

20 //

21 //

22 //

23 //

24 //

25 //

26 ¹⁰ The maintenance of the status quo system of regulating roadless areas
27 through individual forest plans. See, FEIS, Vol.1.

1 Respectfully submitted this 24th day of February 2006.

2 STATE OF MONTANA
3 MIKE McGRATH
4 Montana Attorney General
5 215 North Sanders
6 P.O. Box 201401
7 Helena, MT 59620-1401

8 By: _____
9 CANDACE F. WEST (Mt. Bar No. 2639)
10 Assistant Attorney General
11 *Pro Hac Vice*

12 STATE OF MAINE
13 G. STEVEN ROWE
14 Attorney General
15 MARK RANDLETT (Me. Bar 2784)
16 Assistant Attorney General
17 6 State House Station
18 Augusta, Maine 04330-0006
19 (207)-626-8800

20 **CERTIFICATE OF SERVICE**

21 I hereby certify that I caused a true and accurate copy of the foregoing
22 Amicus Curiae States Memorandum in Support of State Plaintiff's Motion for
23 Summary Judgment to be mailed to:

24 Mr. Bill Lockyer
25 California Attorney General
26 Mr. Ken Alex
27 Ms. Claudia Polsky (CA Bar. 185505)
Claudia.Polsky@doj.ca.gov
Deputy Attorneys General
State of California Department of Justice
1515 Clay Street
P.O. Box 70550
Oakland, CA 94612-1413

Mr. Hardy Myers
Oregon Attorney General
Mr. David E. Leith (OR Bar. 93341)
David.Leith@doj.state.or.us
Assistant Attorney General
1162 Court Street N.E.
Salem, OR 97301-4096

1 Ms. Patricia A. Madrid
New Mexico Attorney General
2 Mr. Stephen R. Farris (NM Bar. 6234)
SFarris@ago.state.nm.us
3 Water, Environment and Utilities Division
P.O. Drawer 1508
4 Santa Fe, NM 87504

5 Mr. Rob Mckenna
Washington Attorney General
6 Ms. Mary Sue Wilson
Senior Assistant Attorney General
7 2425 Bristol Court SW
P.O. Box 40117
8 Olympia, WA 98504-0117

9 Mr. James A. Coda
United States Attorney's Office
10 Environmental & Natural Resources Division
450 Golden Gate Avenue
11 P.O. Box 36055
San Francisco, CA 94102-6055
12 E-mail: james.coda@usdoj.gov

13 Ms. Beverly Li
United States Department of Justice
14 Environment & Natural Resources Division
P.O. Box 663
15 Washington, D.C. 20044-0663
E-mail: Beverly.Li@usdoj.gov

16 Mr. Barclay T. Samford
United States Department of Justice
17 Environment & Natural Resources Division
Suite 945, North Tower
18 999 18th Street
Denver, CO 80202
19 E-mail: Clay.Samford@usdoj.gov

20 Ms. Kristen L. Boyles (CSB #158450)
Earthjustice
21 705 Second Avenue, Suite 203
Seattle, WA 98104-1711
22 (206) 343-7340
23 (206) 343-1526 (Fax)
kboyles@earthjustice.org

24 Mr. Timothy J. Preso (MSB #5255)
Earthjustice
25 209 South Willson Avenue
Bozeman, MT 59715
26 (406) 586-9699
27 (406) 586-9695 (Fax)
tpreso@earthjustice.org

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Mr. Thomas S. Waldo (ASB #9007047)
Earthjustice
325 Fourth Street
Juneau, AK 99801-1145
(907) 586-2751
(907) 463-5891 (Fax)
twaldo@earthjustice.org

Mr. Gregory C. Loarie (CSB #215859)
Earthjustice
426 Seventeenth Street, Fifth Floor
Oakland, CA 94612
(510) 550-6725
(510) 550-6749 (Fax)
gloarie@earthjustice.org

DATED: _____ By: _____